

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GRACIELA DEL MAR et al.,

Plaintiffs and Appellants,

v.

ETHICON ENDO-SURGERY, INC.,

Defendant and Respondent.

B285152

(Los Angeles County
Super. Ct. No. BC466057)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

The Arkin Law Firm, Sharon J. Arkin, and Farrise Firm, P.C., Simona A. Farrise, for Plaintiffs and Appellants.

Tucker Ellis LLP, Mollie F. Benedict, Peter L. Choate and Monee T. Hanna, for Defendant and Respondent.

* * * * *

After a woman died from complications from the insertion of a gastric lap band, her two daughters sued the medical practitioners who inserted the device as well as the device's potential manufacturers. The case against the practitioners proceeded to contractual arbitration, while the case against one of the manufacturers remained in court. The trial court subsequently dismissed the case against that manufacturer due to the daughters' failure to bring it to trial within five years. The daughters appeal. We conclude that the trial court did not abuse its discretion or otherwise err in dismissing the case, and accordingly affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In 2008, Rosa Gonzalez (Gonzalez) contacted 1-800-GET-THIN about getting a gastric lap band device surgically implanted to help her lose weight. She was 60 years old at the time. Medical personnel affiliated with 1-800-GET-THIN (the 1-800 defendants) implanted into Gonzalez either the "Lap Band" manufactured by Allergan, Inc. (Allergan) or the "Realize Band" manufactured by Ethicon Endo-Surgery, Inc. (Ethicon). The Food and Drug Administration (FDA) had conditionally approved Ethicon's "Realize Band" as a "restricted medical device" and the conditional approval obligated Ethicon to (1) provide a training program to physicians who implanted the device and (2) conduct an extensive post-FDA approval study of the device.

In late March 2010, Gonzalez began to experience "severe abdominal pain." In April 2010, she died from septic shock brought about by a perforated bowel and necrotization of the surrounding tissue.

In late 2010, the FDA ordered Ethicon to recall the Realize Band.

II. Procedural Background

A. *Pleadings*

On July 22, 2011, Gonzalez’s daughters—Graciela Del Mar and Margarita Land (collectively, plaintiffs)—sued the 1-800 defendants and Allergan for the wrongful death of their mother under several legal theories. In March 2012, they substituted Ethicon for a Doe defendant. Plaintiffs thereafter filed the operative Second Amended Complaint (SAC), which sued one or more of the 1-800 defendants,¹ as well as Allergan and Ethicon, for (1) battery and lack of informed consent, (2) medical malpractice (by physicians and by the facility where Gonzalez’s surgery was performed), (3) strict products liability, (4) negligence in product design, manufacture and testing, (5) breach of implied warranty, (6) fraud by misrepresentation, (7) fraud by concealment, (8) negligent misrepresentation, and (9) violations of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.).

B. *Order compelling arbitration against many of the 1-800 defendants*

In August 2012, the trial court granted a motion filed by many of the 1-800 defendants to compel arbitration based upon

¹ In the SAC, the 1-800 defendants included 1-800 GET THIN LLC; Weight Loss Centers; Top Surgeons, LLC; Pacific West Dermatology, LLC; New Life Surgery Center, LLC; Beverly Hills Surgery Center, LLC; Top Surgeons, Inc.; Pacific Surgical and Laser Institute; Julian C. Omid, M.D.; Michael Omid, M.D.; George Tashjian, M.D.; Julius Wah Gee, M.D.; Atul Madan, M.D.; Ihsan Najib Shamaan, M.D.; Dana Osborne M.D.; and Shahram Salimitari, M.D.

an arbitration clause contained in a contract signed by Gonzalez. As that motion was being litigated, plaintiffs asked the trial court to “sever out the claims of Ethicon and the remaining defendants so that [they] may proceed in . . . court under [their] state law claims.”

C. *Prosecution of civil case against Ethicon in superior court*

Nearly a year later, plaintiffs propounded three sets of discovery requests to Ethicon.² Ethicon responded in February 2014. Plaintiffs subsequently wrote to Ethicon to complain that the responses were “deficient,” but never filed motions to compel further discovery from Ethicon and never took any other action with respect to obtaining discovery from Ethicon.

D. *Stay of arbitration involving 1-800 defendants*

In December 2014, the 1-800 defendants filed a motion to stay the pending arbitration due to an “ongoing criminal investigation” by the Federal Bureau of Investigation (FBI) into 1-800-GET THIN LLC, which “will force” two of those defendants—Michael Omid, M.D. and Julian Omid, M.D. (the Omid defendants)—to invoke their privileges against self-incrimination. The arbitrator granted the stay.

E. *Stipulations to extend the five-year trial clock in superior court*

1. *The first stipulation*

On July 21, 2015, plaintiffs and Ethicon signed a stipulation to “stay” the superior court “action” “until January 14, 2016” in light of the FBI’s “active and ongoing criminal investigation” into the Omid defendants and 1-800-GET THIN

² By this time, Allergan was no longer a defendant in the case.

LLC, which plaintiffs “contend[ed]” deprived them of a “full and fair opportunity to conduct discovery against the 1-800” defendants and thus rendered them “unable to fully pursue their claims against . . . Ethicon.” The stipulation further provided that “[t]he five-year period within which the action as to Ethicon . . . must be brought to trial pursuant to [Code of Civil Procedure] section 583.310 . . .—which is set to expire on July 22, 2016—is extended to January 16, 2017.”³ The trial court signed the stipulation on July 22, 2015.

2. *The second stipulation*

Nearly a year after the first stipulated stay expired and just days before the extended five-year deadline was to expire in mid-January 2017, plaintiffs and Ethicon signed a second stipulation to “stay” the superior court “action” “until June 26, 2017.”⁴ The stipulation recited the same reasons as the first stipulation. The stipulation further provided that “[t]he five year period within which the action as to Ethicon . . . must be brought to trial pursuant to section 583.310 . . .—which is set to expire on January 16, 2017—is extended to June 26, 2017.” The stipulation lastly provided that “[t]he parties shall re-evaluate this stipulation at the OSC re dismissal scheduled for June 15, 2017.” The trial court signed the stipulation on February 3, 2017.

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

⁴ The parties executed the second stipulation days after the trial court held an Order to Show Cause regarding Dismissal (OSC re dismissal) due to the parties’ failure to appear at a case management conference in November 2016.

F. *Plaintiffs' request for a further extension*

Five days before the twice-extended five-year deadline was to expire in mid-June 2017, plaintiffs filed an ex parte application asking the trial court to extend the five-year deadline to “at least June 26, 2018” (that is, one year). Although they generally sought this relief on “all applicable legal grounds,” plaintiffs only argued that bringing the case to trial by the twice-extended deadline was “impossible, impracticable or futile” under section 583.340, subdivision (c). After Ethicon filed a brief opposition, plaintiffs’ attorney filed a further declaration on the OSC re dismissal (1) explaining that discovery from the 1-800 defendants was essential to the case against Ethicon because Ethicon’s answer pled that “persons or entities other than Ethicon were at fault for [Gonzalez’s] death”; (2) reporting that the 1-800 defendants’ arbitrator had recused himself, and (3) asking for an extension to “at least June 26, 2019” (that is, *two* years).

The trial court denied the ex parte application, but set the matter for argument at the OSC re dismissal originally set by stipulation for June 15, 2017, but continued by the court to June 23, 2017. After entertaining argument, the court denied plaintiffs’ motion to extend the deadline, finding “no good excuse for making the application only days before the extended 5-year deadline is set to expire.”

On July 10, 2017, the court entered its order dismissing Ethicon as a defendant.

G. *Plaintiff’s post-dismissal objection*

The day after the trial court entered its dismissal order, plaintiffs filed an “Objection” to Ethicon’s proposed dismissal order. In their objection, plaintiffs argued that the parties had

agreed to stay the case “until after the arbitration and the passage of six months.”

The trial court never ruled on the objection.

H. *Notice of entry of judgment and appeal*

After Ethicon gave notice of the entry of the dismissal order, plaintiffs filed this timely appeal.

DISCUSSION

In California, a plaintiff must bring her civil case “to trial within five years after the action is commenced” or her case will be dismissed. (§§ 583.310, 583.360; *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1105 (*Gaines*) [“The five-year rule is mandatory and dismissal for noncompliance is required.”].) Among other ways, this period may be “extend[ed]” “[b]y written stipulation” of the parties. (§ 583.330.) In this case, the five-year period that would have expired on July 22, 2016 was, through two stipulations, extended to June 26, 2017. Because plaintiffs did not “commence[]” “trial” by that extended date, however, their case against Ethicon violated the so-called “five-year rule” and was subject to mandatory dismissal.

On appeal, plaintiffs offer three reasons why they did not violate the five-year rule: (1) each of the stipulations “stayed” the “action” for a certain number of days *and* extended the “five-year period,” so each stipulation effectively extended the five-year period by the *sum* of its stay and its extension (thereby leaving an additional 339 days on the clock); (2) the second stipulation extended the end of the five-year period until *exactly* the day the stay was to expire, so plaintiffs are entitled to an additional six months’ grace period under section 583.350; and (3) the indefinite stay of the 1-800 defendants’ arbitration rendered it “impossible,

impractical or futile” to continue prosecuting the case against Ethicon.

To the extent these arguments require us to construe the applicable statutes or the parties’ stipulations, our review is de novo. (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247 [statutes]; *In re Marriage of Starkman* (2005) 129 Cal.App.4th 659, 664 [contracts]; *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 (*Frankel*) [stipulations are contracts].) We review the trial court’s ruling regarding impossibility, impracticality or futility for an abuse of discretion. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 731 (*Bruns*).)

I. Meaning of Stipulations

In calculating whether the five-year period has expired, courts are to “exclude[] the time” during which “[p]rosecution or trial of the action was stayed or enjoined,” at least where the stay encompasses “*all* proceedings in [the] action.” (§ 583.340, subd. (b); *Bruns, supra*, 51 Cal.4th at p. 726.) The parties to a particular action may invoke this exclusion by stipulation. (§ 583.330; see generally § 583.130 [noting “the policy favoring the right of parties to make stipulations in their own interests”].)

In this case, the parties signed two stipulations. Each stipulation (1) “stayed” the action for a specified period of time (178 days in the first stipulation and 161 days in the second), and (2) stated that “[t]he five-year period” was “extended” for a corresponding number of days.⁵

⁵ The first stipulation extended the five-year period by 178 days, but that is because the 177th day fell on a Sunday, making

Plaintiffs argue that the “stay” provision and the “extension” provision of each stipulation were not restatements of the *same* extension but were instead two independent extensions of the five-year period. Thus, plaintiffs reason, each stipulation *both* stayed the action for a period of days *and* granted an *additional* extension of the five-year period for that same period of days, thereby rendering the trial court’s dismissal premature.

We reject this argument. Because stipulations are a form of contract, we must construe them in the manner that best “give[s] effect to the mutual intention of the parties as it existed at the time of contracting.” (*Frankel, supra*, 46 Cal.App.4th at p. 544.) Nothing in the text of the stipulations evinces any intent to grant an extension *twice as long* as the period specified in those stipulations. To the contrary, the fact that the number of days of the “stay” and of the “extension” of the five-year period are identical is evidence that the parties intended the two provisions to be restatements of the same extension rather than to create two separate extensions. Indeed, the stipulations also recited the newly agreed-upon last day of the five-year period; those recitations would have been inaccurate if, as plaintiffs now urge, the stay and the extension were to be counted separately. Plaintiffs suggest that the language extending the five-year period must be read to create a second, distinct extension or else it would be superfluous, but this suggestion ignores that the language extending the five-year period already has a function—namely, satisfying the requirement that parties “expressly waive

the 178th day the next business day. (Code Civ. Proc., § 12, subds. (a) & (b).)

the right to a dismissal” under the five-year rule (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1269, fn. 3).

II. Six Month Grace Period

If the five-year period “is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial,” the plaintiff must be given an additional six months from the end of the tolling or extension to bring the matter to trial. (§ 583.350.)

Citing this provision, plaintiffs assert that they are entitled to an additional six months of time to bring the matter to trial because the second stipulation’s stay expired on the last day of the extended five-year period, which is obviously “less than six months” before the end of the expiration of that period.

We reject this assertion. Even if we assume that a stipulated extension of the five-year period constitutes a “toll[ing] or . . . exten[sion] pursuant to statute” (on the theory that section 583.330 authorizes such stipulations) (cf. *Lakkess v. Superior Court* (1990) 222 Cal.App.3d 531, 538 [section 583.330 applies when extension is mandated by a particular statute]), the parties’ second stipulation is not what left less than six months on the five-year clock. There were fewer than 10 days on the five-year clock when the parties signed the second stipulation. Consequently, it was plaintiffs’ delay in seeking a second, stipulated extension—and not the stipulated extension itself—that left less than six months on the five-year clock. Were we to construe section 583.350 as plaintiffs urge, we would encourage plaintiffs to wait until the five-year clock is nearly expired to seek a stipulated extension that would, in most cases, expire within six months of the extended deadline because doing so would

entitle those plaintiffs to an additional six months on the clock. Such a construction of section 583.350 is antithetical to the five-year rule's goal of "promot[ing] the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed . . . [and] protect[ing] defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time." (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 237 (*Moran*), quoting *General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91.)

Relatedly, plaintiffs observe that the second stipulation's stay of the action until the last day of the five-year period prevented them from taking any formal action in the case until that very last day, thereby making it impossible for them to start trial on that day. This observation ignores the stipulation's built-in safety valve—namely, the parties' agreement to "reevaluate the stipulation" at a hearing set before the expiration of the five-year period. Plaintiffs' observation also provides no justification for re-writing the stipulation. The very existence of the stipulation's safety valve refutes any notion that the parties intended any *more* time to be automatically tacked on to the five-year period. More to the point, there is nothing unlawful about setting the trial date as the last day of the extended five-year period. (E.g., *Obergfell v. Obergfell* (1955) 134 Cal.App.2d 541, 544.) And even if the second stipulation effectively waived the last few days of time plaintiffs had on the five-year clock before signing the second stipulation, the five-year rule may be waived (§ 583.140) and, in such circumstances, the law does not rescue parties from what may in retrospect be an ill-advised stipulation.

III. Impossibility, Impracticability and Futility

In calculating whether the five-year period has expired, courts are also to “exclude[] the time” during which “[b]ringing the action to trial . . . was impossible, impracticable, or futile.” (§ 583.340, subd. (c).) In assessing whether this exception applies, courts are to consider “all of the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves.” (*Moran, supra*, 35 Cal.3d at p. 238; *Martinez v. Landry’s Restaurants, Inc.* (2018) 26 Cal.App.5th 783, 793-794 (*Martinez*).) A plaintiff may avail herself of this exception only if she proves (1) “a circumstance establishing impossibility, impracticability, or futility,” (2) “a causal connection between the circumstance and the failure to move the case to trial within the five-year period,” and (3) “that she was reasonably diligent in prosecuting her case at all stages in the proceedings.” (*Tanguilig v. Neiman Marcus Group, Inc.* (2018) 22 Cal.App.5th 313, 323, 327 (*Tanguilig*); *Bruns, supra*, 51 Cal.4th at p. 731.) A plaintiff’s reasonable diligence is the “critical factor.” (*Gaines, supra*, 62 Cal.4th at p. 1100.)

Plaintiffs contend that the arbitrator’s stay of the arbitration involving the 1-800 defendants rendered their prosecution of the case against Ethicon impossible, impracticable, or futile because the reason for that stay—an invocation, by some of the 1-800 defendants, of their privileges against self-incrimination—precluded plaintiffs from obtaining discovery from those defendants that would help them prove that Ethicon did not properly train the 1-800 defendants on how to implant the Realize Band and that Ethicon did not conduct a sufficient post-approval study.

The trial court did not abuse its discretion in rejecting plaintiff's contention because the court could reasonably conclude that plaintiffs did not establish any of the three perquisites to relief under section 583.340, subdivision (c).

First, plaintiffs did not prove any circumstance establishing impossibility, impracticality, or futility. Plaintiffs did not establish "impossibility." At best, they showed that the arbitration stay made it more difficult to obtain evidence from the 1-800 defendants that pertained to a *subset* of their claims against Ethicon (namely, those claims based on Ethicon's failure to train and to conduct a post-approval study). Plaintiffs did not explain how information held by the 1-800 defendants had any bearing on their claims against Ethicon for its allegedly deficient product design, manufacture or product warnings. Prosecution is not made "impossible" unless a plaintiff encounters an "obstacle to trying *all* of [her] claims, as expansively as she alleged them." (*Tanguilig, supra*, 22 Cal.App.5th at p. 328, italics added.) Plaintiffs did not establish "impracticability." Where, as here, "the delay involves the time necessary for the parties to conduct ordinary incidents of proceedings leading up to trial" such as discovery, a circumstance renders prosecution impracticable only if it "deprive[s] the plaintiff of a "substantial portion" of the five-year period for prosecuting the lawsuit." (*Gaines, supra*, 62 Cal.4th at p. 1102.) In this case, the arbitrator did not stay the arbitration until around February 2015, over three and a half years after plaintiffs filed their lawsuit and thus 70 percent of the way through the five-year period. Plaintiffs did not establish "futility" because, as explained below regarding the lack of a causal connection, the arbitration stay itself did not necessarily

put the evidence out of reach and, regardless, plaintiffs had had years to obtain that evidence prior to the stay.

Second, plaintiffs did not prove a causal connection between the arbitration stay and their failure to get the case to trial in five years. That is because *the stay* did not prevent the plaintiffs from seeking discovery from the 1-800 defendants for most of the five-year period. Plaintiffs had *years* to seek discovery from the 1-800 defendants in both the superior court and in arbitration prior to the entry of the arbitration stay: The litigation was pending for 15 months before the trial court granted the motion to compel arbitration and the arbitration was pending for almost another two years before the 1-800 defendants sought the arbitration stay. Plaintiffs propounded discovery requests to the 1-800 defendants during these three-plus years, but did not file with the arbitrator any motions to compel discovery from the 1-800 defendants until the very end of that period and then set them for hearing on the same day as the motion to stay the arbitration. The possibility that two of the 1-800 defendants might have asserted their privilege against self-incrimination to block discovery during the three-plus year period is of no matter because litigation over whether the privilege applies to “each specific area that the questioning party seeks to explore” (*Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 285) is “part of the “normal delays involved in prosecuting lawsuits” and do[es] not excuse [the] failure to bring a case to trial within the five-year limit” (*Martinez, supra*, 26 Cal.App.5th at p. 796, quoting *Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1016). Thus, because plaintiffs reasonably could have sought discovery from the 1-800 defendants during the more than

three years before the arbitration stay, there is no causal connection between the stay and their delay.

Plaintiffs also did not establish that they were reasonably diligent in prosecuting the case against Ethicon or, more specifically, in trying to obtain the information from the 1-800 defendants that they now claim excuses their delay in prosecution. As noted above, plaintiffs did not compel discovery from the 1-800 defendants until shortly before the arbitration stay, over three years after they filed the underlying case. That two of the 1-800 defendants invoked their privilege against self-incrimination did not relieve plaintiffs of their “affirmative obligation to do what is necessary to move [their] action [against Ethicon] forward to trial in a timely fashion.” (*Tanguilig, supra*, 22 Cal.App.5th at p. 322; *Tejada v. Blas* (1987) 196 Cal.App.3d 1335, 1340 [“Uncooperative conduct by a defendant does not justify inaction on the part of a plaintiff.”].) Plaintiffs also never followed up on trying to get the same information from Ethicon; they made a handful of discovery requests in late 2013, complained about the inadequacy of Ethicon’s responses in early 2014, and in the next three years did not file a motion to compel further responses from Ethicon or propound a new round of discovery to Ethicon. For most of the nearly six years prior to dismissal, plaintiffs did almost nothing to move the case against Ethicon forward. (Accord, *Khoury v. Comprehensive Health Agency, Inc.* (1983) 140 Cal.App.3d 714, 717-718 [arbitration between plaintiff and one defendant did not preclude prosecution of severed, parallel portion of the case between plaintiff and another defendant]; *Tanguilig, supra*, 22 Cal.App.5th at pp. 328-330 [arbitration between co-plaintiff and defendant did not

preclude prosecution of severed, parallel portion of the case between plaintiff and that defendant].)

Plaintiffs offer three arguments in response.

First, they analogize this case to *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204 (*Marcus*). In *Marcus*, the plaintiff sued a corporate entity and its officers; when the entity successfully moved to compel arbitration, the officers sought a stay of the proceedings in trial court under section 1281.4. (*Id.* at pp. 207-209.) *Marcus* held that the officers were entitled to such a stay (*id.* at p. 212), and that this stay *also* tolled the five-year period under former section 583 (*id.* at pp. 212-213; see also *Gaines, supra*, 62 Cal.4th at p. 1095 [section 1281.4 stay automatically extends five-year period]; *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1798-1799 (*Brock*) [same].) *Marcus* is inapt because plaintiffs here never sought a stay of the proceedings against Ethicon under section 1281.4, and such a stay comes into being only if it is requested. (*Brock*, at p. 1796 [“The party seeking resolution via contractual arbitration must also file a motion in the action at law to stay it . . .; it will not be stayed automatically.”].) Indeed, plaintiffs here not only forewent a stay but affirmatively asked the trial court to “sever out the claims of Ethicon and the remaining defendants so that [plaintiffs] may proceed in this court under [their] state law claims.”

Second, plaintiffs cite the default principle that “trial on the merits is preferred” over dismissal under the five-year rule. (§ 583.130; see generally *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398 [noting similar principle at work when granting continuances of motions for summary judgment]; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233-234 [same, when

granting motions for relief from default].) This principle may well come into play as a “tie breaker,” but does not constitute a separate basis for relief from the five-year rule; if it did, the rule would cease to exist.

Lastly, plaintiffs assert that giving them more time to wait for the arbitration involving the 1-800 defendants to resolve—and then to get discovery from those defendants—will be “fair to Ethicon, too” because it will provide Ethicon with more information with which to defend itself. From Ethicon’s perspective, dismissal—and the elimination of any need to defend itself—is its preferred (and thus, to Ethicon, fairer) result.⁶

⁶ Given how we have resolved these issues, we have no occasion to reach Ethicon’s alternative arguments that plaintiffs’ first two arguments were forfeited and that the stipulations did not stay the entire action.

DISPOSITION

The judgment of dismissal is affirmed. Ethicon is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ